Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1994 TERM

VIVAN HAMMOUD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether the court of appeals misapplied the appellate standard for reviewing evidence. Whether, in deferring to the jury as to the weight of the evidence, the court failed to consider its legal sufficiency.

II. Whether this court should define and/or clarify the meaning of "materiality" for purposes of charging defendants with making false representations in violation of federal statutes.

III. When a bank officer produced defendant's account records, and the trial judge then barred defense cross-examination about the bank's prior written statement that the bank did not possess such records, whether the defendant was denied her constitutional right to confront and cross-examine an accuser.

List of Parties

The names of all parties to this proceeding appear in the caption of this case.

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Reports of Opinions

The only decision delivered in this case, by any other court or administrative agency, was an unpublished order of the United States Court of Appeals, Second Circuit, filed on March 9, 1995. A copy of this order is included in the Appendix attached hereto.

Statement Of Jurisdiction

This Court possesses jurisdiction over this cause pursuant to 28 U.S.C. § 1254(1).

On October 24, 1991, a federal grand jury charged defendant Vivian Givan-Hammoud in a ten count indictment. Following a jury trial, the defendant was found guilty. The district court entered judgment on May 6, 1994. The defendant filed her notice of appeal on May 13, 1994.

On March 9, 1995, the United States Court of Appeals for the Second Circuit issued an order affirming the judgment of the District Court. Defendant-petitioner is filing this petition for certiorari on June 7, 1995.

Constitutional and Statutory Provisions Involved

U.S. Constitution, Amendment VI.

18 U.S.C. § 1014

42 U.S.C. § 408(g)(2)

The texts of these provisions can be found in the Appendix attached hereto.

Statement of the Case

Defendant Vivian Givan-Hammoud was charged by indictment with giving false information on five credit applications (four applications for credit cards and one application for a bank loan). As for each application, the defendant was accused of providing the same incorrect date of birth and the same incorrect social security number. Thus, five counts alleged violations of 18 U.S.C. § 1014 (providing false information to banks), and five counts alleged violations of 42 U.S.C. § 408(g)(2) (misrepresentation social security number).

At trial, the prosecution called James Husted, special agent with the United States Secret Service. Husted testified that in the course of his investigation, he gathered applications from various banks. Exhibit 100 was a credit card application for Marine Midland Bank, with a birth date

of 12/10/57 and a social security number of 125-60-7334. Exhibit 200 was a credit card application for Key Bank, with an age listed as 29 and the 125-60-7334 social security number. Exhibit 300 was a loan application for M&T Bank, with a birth date of 12/10/57 and the 125-60-7334 social security number. Exhibit 400 was a credit card application for Fleet/Norstar Bank, with a birth date of 12/10/57 and again the 125-60-7334 social security number. Finally, Exhibit 500A was a credit card application for Goldome Bank, with an age of 29 and the same 125-60-7334 social security number.

In the course of his investigation, Husted determined that the social security number 125-60-7334 did not belong to the defendant. Hammoud's Illinois driver's license showed a birth date of 12/10/57 and the social security number 125-60-7334. He also stated that he came into possession of

her correct social security card with the number 375-44-8931.

Husted testified that he interviewed the defendant on August 23, 1989, at his office. Ms. Hammoud arrived with her husband, Mahmoud Hammoud, who waited in the reception area while Ms. Hammoud was interviewed.

During the interview, Ms. Hammoud stated that her wallet had been stolen in 1984. Inside the wallet was her social security number. Thereafter, Ms. Hammoud went to Northtown Plaza, where she received number 125-60-7334. Hammoud then used that number when she applied for her driver's license in Illinois. Later, Ms. Hammoud discovered that she was using an incorrect social security number when she found her actual social security card in another purse.

Hammoud initially refused to tell Husted her birth date, but finally stated

that it was 12/10/43. When Husted began to discuss Ms. Hammoud's date of birth, she asked him to be quiet because she did not want her husband to hear.

Husted requested that Ms. Hammoud sign a sworn statement that he wrote out. After Hammoud signed the statement, Husted served her with a subpoena for handwriting samples, photographs, fingerprints and palm prints. The entire conversation lasted about three hours.

Hammoud complied with the demands for handwriting exemplars. Husted submitted these known handwriting samples, along with some of the documents he was investigating, for analysis to the Secret Service lab in Washington, D.C.

Gregory Floyd, examiner of questioned documents for the Secret Service, provided expert testimony regarding the handwriting on pertinent documents. Floyd only opined that the signature and return address

portions of Exhibit 200 were written by the defendant. Exhibit 400 was "probably" written by the defendant. Floyd explained that "when I say, probably, I would mean likely to occur." Floyd also opined that the defendant "may have written the names" on Exhibit 500A.

On cross-examination, Floyd testified that two of the applications -- Exhibits 100 and 300 -- were never submitted to him for analysis. Regarding Exhibit 200, his conclusion pertained only to the signature and the return address, but not the birth date and social security number written on the reverse side. The signature itself was written over other writing that had been covered with whiteout. He stated that no other tests were performed on these exhibits, such as electron microscope or ink analysis. Although it would have been possible to test these documents to see which portions had been written first, no

such tests were performed.

The prosecution also called the defendant's ex-husband, Mahmoud Hammoud, as a witness. Mahmoud testified that he met Vivian Givan in 1984, when he was a freshman studying mechanical engineering. The two were married in 1986. Mahmoud was twenty-three years old, and Vivian was twenty-nine.

On cross-examination, Mahmoud testified that he came to the U.S. in 1981 to attend school. He was then assigned a number to serve as his social security number. Later, he was assigned a different social security number, 105-66-3380. Mahmoud met Vivian in 1983 or 1984, and they were married in December of 1986. Four or five months later, Mahmoud applied for a green card. He received his temporary green card in August of 1987. Mahmoud applied for his permanent green card in August of 1989, and received it in

late 1989 or early 1990. Mahmoud and Vivian were divorced in March or April of 1991, and in June of 1991 he went to work for Xerox.

Mahmoud testified that he did not find out Vivian's true age until spring of 1989. Actually, there is a twenty year difference in their ages.

During the course of their marriage, Mahmoud saw Vivian's social security number. If he needed to use it, he would look on whatever form that happened to have the number. He also had access to his wife's purse and Illinois driver's license.

During their divorce, Mahmoud saw a document indicating that Vivian had inherited $50,000 and had spent it on them. For eight years, Mahmoud had been a student in the U.S., but he sent money back to his family in Lebanon. Mahmoud's income was $800 in 1986; $23,000 in 1988; and $48,000 in 1992.

When it was pointed out that his Dreyfus Gold application stated that his salary in 1988 was $23,800, but his 1040 form stated that his income for that year was $16,858.37, Mahmoud denied that he put down the information on the Dreyfus application. He also denied that he signed the form.

On redirect, Mahmoud testified that he didn't love Vivian and never loved her.

Another witness called by the prosecution was Deborrah Pettit, an officer from Northern Illinois University. Pettit testified that she executed a search warrant on May 23, 1989, and the defendant's Illinois driver's license and social security card were confiscated. The defendant told Pettit that her birth date was 12/10/43, but she claimed the birth date of 12/10/57 because she was much older than her husband and did not want him to know her actual age.

Hammoud also told Pettit that there had been a break-in in New York, and many of her IDs had been taken. The defendant stated that she went to a Social Security Office in Buffalo, but got the wrong number.

The prosecution also called several witnesses to testify on behalf of the banks. None of these witnesses had any personal knowledge of the defendant or of the applications in question. All of these witnesses were called to lay foundations for documents, and all of them based their testimony upon the records and usual procedures for record-keeping.

The bank witnesses testified that an applicant's birth date or age is not a factor in determining credit or running a credit check. Also, some banks received valid information from TRW credit reporting and/or possessed other information about prior or existing accounts for the

defendant. These other accounts disclosed her correct social security number and birth date.

On December 17, 1993, the jury returned its verdict, finding the defendant guilty on all ten counts. The trial judge entered judgment on May 6, 1994; however, defendant's sentence was stayed until after the appeal.

The defendant filed her notice of appeal on May 13, 1994. On March 9, 1995, the United States Court of Appeals for the Second Circuit issued an order affirming the judgment of the district court.

Defendant-petitioner is filing this petition for certiorari on June 7, 1995.

Argument

I. The court of appeals misapplied the appellate standard for reviewing evidence. In deferring to the jury as to the weight of the evidence, the court failed to consider its legal sufficiency.

A petition for writ of certiorari may be granted when a court of appeals has a decided a federal question in a way that conflicts with applicable decisions of the Supreme Court. Supreme Court Rule 10.1(c). Applying this criterion, this Court should grant this petition and thereafter reverse the defendant's convictions because the prosecution failed to prove her guilt beyond a reasonable doubt.

The appropriate legal standard for reviewing the sufficiency of the evidence is beyond dispute. In Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 573, 99

S.Ct. 2781 (1979), this Court stated,

> "...the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

In the case at bar, the defendant does not assert that the court of appeals applied wrong standard of review, but rather misapplied the standard. The court of appeals treated the defense contentions as if they all pertained to the weight of the evidence, rather than to the sufficiency of it.

In Jackson, this Court rejected the presumption that juries' determinations of guilt will always be without constitutional defect. Jackson, 443 U.S. at 323. This Court also stressed that the "deprivation of liberty through the invocation of the

criminal sanction is simply not to be achieved at the expense of a constitutional right...." Jackson, 443 U.S. at 323. Moreover, though often overlooked, this Court has rejected the assertion that a "mere modicum" of evidence should pass judicial scrutiny. Jackson, 443 U.S. at 320.

Applying the forgoing authority to the case at bar, it is clear that the prosecution failed to present evidence sufficient to prove the defendant guilty. The defendant was charged with providing the same incorrect birth date and the same incorrect social security number on five different applications. Each application gave rise to two charges: one count each of violating 18 U.S.C. § 1014 (providing false information to banks), and one count each of violating 42 U.S.C. § 408(g)(2) (misrepresenting social security number), totaling ten counts. In the end, the jury

convicted the defendant on all counts.

The defendant does not concede to the sufficiency of the evidence on any of the ten counts. Out of the five applications, only one was opined to have contained her signature.[1] As to two other applications,

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[1]The government's handwriting expert opined that the signature and return address on only one application, Exhibit 200, was written by the defendant. (R. 618) But even this writing was very suspect since it was written over other writing that had been covered with whiteout. (R. 619)

However, more importantly, the expert's conclusion did not extend to the allegedly false information written *on the reverse side of the application*. (R. 618) Thus, the question remains, even assuming the expert were correct that the defendant signed her name and return address on Exhibit 200, who wrote the information on the reverse side? And if the information was written by another person, was it written after the

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the prosecution failed to provide such evidence.[2] As to the remaining two applications, the prosecution failed to even submit them for handwriting analysis.[3]

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defendant's signature was placed on the reverse side of the application? While this data could have been obtained through additional testing by the government, no testing was ever performed. (R. 619-22) Further, defendant's ex-husband, who had motive means and opportunity, was never asked to submitted handwriting exemplars for analysis, nor was he even questioned to determine if he had made the writings on these applications.

[2]The government's expert was only able to state that Exhibit 400 was "probably" written by the defendant. The agent explained that "when I say, probably, I would mean likely to occur." (R. 599) The expert also opined that the defendant "may have written the names" on Exhibit 501. (R. 600)

[3]R. 618.

One application was not signed, and one obviously contained the writings of several people, as evidence by different inks and handwriting styles. The prosecution did not identify the persons responsible for these writings. Moreover, the prosecution did not provide a single eye witness who saw the defendant complete or sign any of the applications.[4] Thus, the verdicts were based on mere speculation.

The "reasonable doubt" standard is based upon "reason." Jackson, 443 U.S. 317. Here, however, the jury's verdict cannot be said to be based upon reason. In other words, it cannot be said that the jury fulfilled its duty to serve as a rational trier of fact. See Jackson, 443 U.S. at 319.[5]

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[4]R. 225, 248, 261-62, 263, 275, 292, 310-11, 342, 353-54, 365, 380-82, 406-07, 440-41.

[5]Through cross-examination of the defendant's

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ex-husband, the defendant provided a rational explanation as to who actually supplied the incorrect social security number and birth date to the banks. Although he denied involvement in the false applications, Mr. Hammoud admitted at trial that (a) he married Vivian, (b) he could not obtain much credit on his own because he was a foreigner, (c) Vivian supported him while he attended school for his bachelor's and two master's degrees, (d) he benefited from the credit that was extended in Vivian's name as a result of the subject applications, (e) he obtained his green card, (f) he secured a high paying job with Xerox, (g) he filed for divorce against Vivian, and that (h) he never loved Vivian. (R. 540-543, 545-49, 553-55, 575, 581) Also, at trial it was uncontroverted that Mr. Hammoud believed his wife to be much younger than she actually was; that he had access to her purse which contained her Illinois driver's license showing the incorrect social security number of 125-60-7334 and date of birth of 12-10-

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Why, then, did the jury vote to convict the defendant? The answer appears to be that the jury based its verdict upon some misguided notion of "moral certainty" rather than "evidentiary certainty." See Cage v. Lousiana, 498 U.S. 39, 41, 112 L.Ed.2d 339, 111 S.Ct. 328 (1990), where this Court explained that a distinction exists between "moral certainty" and "evidentiary certainty," with the former (moral certainty) being inadequate to protect against verdicts based upon a degree of proof less than that required by the due process clause.

57; and that whenever he needed her social security number, Mr. Hammoud would obtain it from whatever form that showed it. (R. 545-48; Exhibit 1) Thus, the defendant's ex-husband had ample motive and opportunity to make and file the false applications. The Court of Appeals discounted all of this evidence in passing.

While the defendant denied submitting the false information or even applying for the credit, Ms. Hammoud admitted that she eventually used the credit cards. The prosecuting banks' own records showed that Ms. Hammoud made substantial and continued payments on the accounts created in her name. When her marriage failed and her financial situation deteriorated, the defendant was unable to pay all of the debts. While this appears to be the moral basis upon which the jury reached its verdict of guilty, these were not the acts for which the defendant was charged.

Interestingly, the court of appeals appears to have been confused on the significance of the defendant's use of the credit cards. The court stated that the jury could infer that Ms. Hammoud applied for the cards merely because she received and used them. This is directly contrary to the prosecution's claim that a credit

card can be used by one person after another person had applied for it.[6] Thus, the court of appeals' analysis is inconsistent with the prosecution's position, and the court has sanctioned a verdict based on unfounded speculation.[7]

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[6]R. 558-59, 571.

[7]Further confusing the situation was the introduction of other alleged uncharged crimes or bad acts that should not have been presented to the jury. Prior to trial, the judge denied a defense motion in limine to preclude the introduction of such alleged evidence. Accordingly, the government called several witnesses whose testimony was purportedly admitted for the limited purpose of attempting to prove identity and/or lack of mistake as to the charged offenses. (R. 454-55, 466, 472, 481, 498) In light of the foregoing analysis, however, it is clear that this testimony prejudiced the defendant, confused the jury and resulted in a verdict based upon "moral certainty" rather than

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In conclusion, this Court has rejected the notion that the reversal of a conviction must be based upon moral blamelessness. (Jackson, 443 U.S. at 323-24.) Notwithstanding the defendant's use of the accounts in question, and her payments thereto, this does not negate the fact that the defendant did not place the false information on the applications. The government failed to provide sufficient evidence that the defendant wrote the incorrect information on all five applications. The court of appeals failed to properly apply the standards of review enunciated by this Court.

Accordingly, this Court should grant the petition for certiorari, hold that the court of appeals failed to properly apply

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"evidentiary certainty." Once again, the defendant's convictions were not based upon legally sufficient evidence.

the correct standard of review, and reverse the defendant's convictions on the ground that the government failed to meet its burden of proof.

II. This court should define and/or clarify the meaning of "materiality" for purposes of charging defendants with making false representations in violation of federal statutes.

A petition for writ of certiorari may be granted when a decision of a court of appeals conflicts with that of another court, or a court of appeals has decided an important question of law which has not been, but should be settled by the Supreme Court. Supreme Court Rule 10.1(a), (c). Applying these criteria, this Court should grant this petition and thereafter define and/or clarify the meaning of "materiality"

for purposes of charging defendants with making false representations in violation of federal statutes.

In this case, the defendant was charged with giving the same incorrect birth date and the same incorrect social security number on five application, in violation of 18 U.S.C. § 1014 (providing false information to banks), and 42 U.S.C. § 408(g)(2) (misrepresentation of social security number).[8]

Federal statutes proscribing false

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[8]In addition to interpreting the statutes directly involved in this case, clarification of the materiality requirement would also provide valuable guidance to similar provisions in other statutes. See, for example, 18 U.S.C. §§ 1001, 1344. As stated in United States v. Shriver, 842 F.2d 968, 977 (7th Cir. 1988), "There is no meaningful distinction between the materiality element of § 1014 and that of § 1001."

statements criminalize only "material" misrepresentations.[9] A false statement is material if it is shown to be capable of influencing a decision. United States v. Williams, 12 F.3d 452, 456 (1994). The issue of materiality is a question to be resolved by the district judge rather than the jury. United States v. Shriver, 842 F.2d 968, 977 (7th Cir. 1988). On appeal, when it is determined that false statements were not material, a defendant's convictions must be vacated. Williams, 12 F.3d at 158.

Unfortunately, considerable confusion has arisen over the definition and significance of the materiality requirement. While some courts have

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[9]United States v. Ryan, 828 F.2d 1010, 1013 (3rd Cir. 1987) (addressing 18 U.S.C. § 1014); see also United States v. Greber, 760 F.2d 68, 73 (3rd Cir. 1985) (18 U.S.C. § 1001).

concluded that materiality can exist even where there is no reliance,[10] at least one court has implied that reliance plays a role in the analysis.[11]

Confusion also exists as to the evidentiary significance of the materiality requirement. While one court has sought to minimize the burden of proof that materiality places upon the government,[12] other courts have acknowledged that materiality does impact upon the

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[10]United States v. Hutchison, 22 F.3d 846 (9th Cir. 1993); United States v. Shriver, 842 F.2d 968 (7th Cir. 1988).

[11]United States v. Haddock, 956 F.2d 1534, 1551 (10th Cir. 1992), "the bank relied on the strength of [defendant's] personal financial position...."

[12]United States v. Ramos, 725 F.2d 1322 (11th Cir. 1984) (explicit evidence as to how a statement may have influenced an agency is not required).

evidentiary requirement.[13]

This confusion regarding materiality is evident in the analysis employed by the court of appeals in the case at bar. Citing United States v. Ryan, 828 F.2d 1010 (3rd Cir. 1987), the court concluded that an applicant's social security and birth date are "highly material" on a loan application. However, this conclusion is not only unsupported by the Ryan decision,

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[13](United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994) ("the government must prove that the false statement matters"); (United States v. Grizzle, 933 F.2d 943, 948 (11th Cir. 1991) ("[t]he government must prove at trial that the statement had the capacity to influence a determination"); United States v. Davis, 989 F.2d 244, 247 (7th Cir. 1993) (where the government fails to prove that an alleged misrepresentation is material, the Court of Appeals must reverse the conviction).

it is contrary to it. What the Ryan court actually stated was that,

> ...in this case [Ryan] the government presented ample evidence indicating that a loan applicant's Social Security number is a key piece of information in the bank's effort to obtain an accurate credit report. Ryan, 828 F.2d at 1018.

Such is not true in the case at bar. The court of appeals' assertion that "the Banks used an applicant's social security number and birth date to verify the identity of the applicant and to obtain credit information," is a total misstatement of the evidence. To the contrary, the evidence proved that the defendant's social security number and birth date were not key pieces of information in obtaining her credit reports. The testimony of the prosecution's own witnesses revealed that the defendant's credit reports could be and

were obtained without this information.[14]

Unlike Ryan, here the government did not prove materiality. In failing to require such proof, the decision of the court of appeals is in conflict with the Ryan decision.

Accordingly, this Court should grant this petition for certiorari, clarify the definition of "materiality," declare that as an element of the offense materiality must be proved beyond a reasonable doubt, and find that the government failed to meet its burden in this case.

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[14]R. 257, 265, 271-72, 350, 384-86, 413-14; see also 472-73.

III. When a bank officer produced defendant's account records, and the trial judge then barred defense cross-examination about the bank's prior written statement that the bank did not possess such records, the defendant was denied her constitutional right to confront and cross-examine an accuser.

A petition for writ of certiorari may be granted when a court of appeals has a decided a federal question in a way that conflicts with applicable decisions of the Supreme Court. Supreme Court Rule 10.1(c). Applying this criterion, this Court should grant this petition and thereafter reverse the defendant's convictions because her constitutional right to confront and cross-examine her accuser was violated.

The prosecution called Fleet/Norstar vice-president Randall Philipps as witness to establish a foundation for the admission

of numerous Fleet/Norstar Bank documents. On cross-examination, the defense attempted to question Philipps about Fleet/Norstar's previous written response to a pre-trial subpoena, wherein Fleet/Norstar stated, "we have searched our records and found no account relationships with either Vivian Hammoud or Vivian Givan."[15]

The prosecution objected. Defense counsel responded that this cross-examination this went to the "reliability of the documents which the Government is now presenting to the jury."[16] Defense counsel also pointed our that the witness had testified that the bank provided copies to the prosecution, while retaining the original microfiches of the defendant's account records. Thus, the bank's prior statements that it had no records for the

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[15]Defense Exhibits 1 and 2.

[16]R. 396.

defendant undermined the witness's credibility. Finally, defense counsel asserted that the conflict between Philipps' testimony and Fleet/Norstar's written statement raised an issue of bias on the part of the bank and its officer/witness.[17]

The prosecution argued that cross-examination should not be allowed because there was no discovery violation.[18] The trial judge agreed.[19] This ruling is the most mystifying and troublesome of

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[17]R. 396.

[18]R. 397-9.

[19]The judge stated, "The exhibits will not be shown to the jury. There are many avenues that you had to search out this information and I can see nothing here where any information is being hid from you.... I don't see how you are deprived of any opportunity to defend your client because of the response to this subpoena." (R. 400)

counsel's career. The reasons why the defense attempted to bring Fleet/Norstar's statement to the attention of the jury had nothing to do with discovery. Rather, the contents of the statement raised issues of bias, credibility and document reliability.

The sixth amendment to the United States Constitution provides,

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." (U.S. Const., Amend. VI.)

In Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965), this Court stated that a primary interest secured by the confrontation clause is the right of cross-examination. Later, in Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), this Court stated, "a criminal defendant states a violation of the

Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors * * * could appropriately draw inferences relating to the reliability of the witness.'" Van Arsdall, 475 U.S. at 680.

In Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), this Court explicitly held that the sixth amendment right to confront witnesses includes the right of cross-examination:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to

delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e. to discredit, the witness * * * by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." (Davis, 415 U.S. at 316.)

In Davis, this Court also emphasized,

"The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' [Citation.] We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis, 415 U.S.

at 316.

In affirming the district court on this point, the Court of Appeals provided three reasons: (1) the trial judge has broad discretion to limit cross-examination, (2) the attempted cross-examination was "of little probative value," and (3) the defense could have called a representative of the bank with knowledge of the processing of the subpoena. For the reasons that follow, these points are utterly without merit.

First, while properly attempting to attack the credibility of the witness and the reliability of the bank's documents, defense counsel was not engaged in either repetitive or unduly harassing interrogation. How can it be said that defense counsel was repetitive or harassing when he was never allowed to ask the first question? The district court lacked

discretion to completely bar this line of questioning.

Second, any implication that this error was harmless must be rejected. The question of whether the outcome of the trial was affected is not the proper inquiry in determining whether the confrontation clause has been violated; rather, the appropriate question is whether there was interference with the defendant's opportunity for cross-examination. Kentucky v. Stincer (1987), 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631. Moreover, in this case harmless error analysis is inapplicable because the line of cross-examination was of extraordinary importance. In barring cross-examination, the judge crippled the defense. Since the prosecution did not present a single eyewitness, its case rested upon the believability of the banks' witnesses and the reliability of their documents.

Preventing this cross-examination precluded the defense from attacking the core of the prosecution's case.

Third, the Court of Appeals claim that the defense should have called a representative of the Bank with knowledge of the processing of the subpoena is nonsense. The witness that the defense sought to cross-examine, Randall Philipps, was a bank vice-president.[20] As this Court stated a century ago,

> "If the company ought to have known of the facts, or, with proper attention to its own business, would have been apprised of them, it has no right to set up ignorance as an excuse." Knights of Pythias v. Kalinski (1895), 163 U.S. 289, 16 S.Ct. 1047, 1051, 41 L.Ed. 163.

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[20] R. 363-4.

Moreover, in this case we need not delve into the presumption of a corporate officer's knowledge. The record explicitly refutes the implication that Philipps lacked the requisite knowledge to answer questions about the bank's written statement. Philipps previously testified that he was familiar with the procedures used by his bank,[21] and he provided testimony about what happens when the bank receives a subpoena.[22] Philipps even testified as to how the bank would respond if it received a subpoena for records, and then found no records. He stated that the bank would send a letter that was generated and produced in the course of the bank's operations.[23] Thus, the rationale of the court of appeals is merely an after-the-

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[21] R. 388.

[22] R. 388.

[23] R. 389.

fact attempt to justify a bad ruling.

The decision of the court of appeals, upholding a clear violation of defendant's constitutional rights, is contrary to this Court's decisions in Douglas, Van Arsdall, Davis and Stincer. Accordingly, this Court should grant this petition for a writ of certiorari, reverse the defendant's convictions, and remand for further proceedings.

Conclusion

Wherefore, for the foregoing reasons, the defendant-petitioner requests that this Court grant her petition for writ of certiorari, reverse her convictions, and/or remand this cause for further proceedings.

Respectfully submitted,

Vivian Givan-Hammoud,
Defendant-Petitioner, by:

Howard Roland Wertz

Howard Roland Wertz
Attorney of Record
for Petitioner

Howard Roland Wertz
Attorney at Law
2748 Lighthouse Court
Lynwood, Illinois 60411
708-418-8989

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of March, one thousand nine hundred and ninety-five.

PRESENT:

HON. JAMES L. OAKES,

HON. ROGER J. MINER,

HON. DENNIS G. JACOBS,

Circuit Judges.

UNITED STATES of AMERICA,

Appellee,

v. ORDER

94-1281

VIVIAN HAMMOUD, also known as Vivian Givan,

Defendant-Appellant.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Western District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Defendant-appellant Vivian Hammoud appeals from a judgment of conviction and sentence entered in the United States District Court for the Western District of New York (Curtin, J.) convicting her on five counts of making false statements to federally insured banks, in violation of 18 U.S.C. § 1014, and five counts of misrepresenting a social security number as her own, in violation of 42 U.S.C. § 408(g)(2), and sentencing her to a six-month term of imprisonment and a $500 special assessment.

Hammoud's principal contention on appeal is that her convictions are not supported by sufficient evidence. She

complains that, during her four-day jury trial, the prosecution failed to present a single eyewitness or provide any expert testimony to definitively establish that she submitted credit card applications to Key Bank, M&T Bank, Norstar Bank, Marine Midland Bank, N.A. and Goldome Bank ("the Banks") bearing her name but with false social security numbers and birth dates.

A conviction after a jury trial must be upheld if, after viewing the evidence in the light most favorable to the government, a rational jury could have found the elements of the crime beyond a reasonable doubt. United States v Rivera, 971 F.2d 876, 890 (2d Cir. 1992). Any questions as to a witness' credibility goes to the weight of the evidence, not its sufficiency. See United States v. Roman, 870 F.2d 65, 71 (2d Cir.), cert. denied, 490 U.S. 1109 (1989). Applying these principles, we conclude that there was

ample evidence adduced at trial to support the jury's verdict.

First, the government established, and defense counsel later conceded, that Hammoud actively had used the charge cards issued in her name by the Banks. While we agree with Hammoud that her use of a credit card does not conclusively establish that she was the applicant, the jury was entitled to infer that a person who regularly used credit cards and made payments on the accounts, as she did, had, in fact, applied for the cards that she used.

At trial defense counsel attempted to shift the blame for the false applications to Hammoud's husband. However, Mr. Hammoud testified that he played no part in submitting any of the false credit card applications for which his wife was convicted. The jury certainly was entitled to credit his testimony, particularly where

Ms. Hammoud's story contained significant implausibilities. For example, when questioned by a Secret Service agent regarding the false applications bearing her name, Hammoud explained that "around 1984" her wallet -- containing her driver's license and social security card -- had been stolen from a gym locker. She claimed that, after the theft, she went to the Northtown Plaza Social Security office and received a "temporary" social security number that she later determined was incorrect. However, a representative of the Northtown office testified that new social security cards are mailed from a central office in Maryland, that the Northtown office has no blank or temporary cards, and that the office does not issue temporary social security numbers.

Finally, the government presented evidence that Hammoud had prepared false loan applications that were submitted to

the Banks. The government's handwriting expert testified that he was positive that Hammoud had signed the Key Bank credit card application and that he believed it was probable that she had signed several other applications, defining probable as "likely to have occurred." This was sufficient evidence for the jury to have reasonably concluded that Hammoud had prepared these documents. We reject Hammoud's contention that a criminal conviction need be supported by conclusive expert testimony. See United States v. Worthington, 822 F.2d 315, 319 (2d Cir.), cert. denied, 484 U.S. 944 (1987). The expert's lack of certainty goes to the weight to be accorded his opinion and is a matter to be evaluated by the jury. See United States v. Wilson, 441 F.2d 655, 656 (2d Cir. 1971). Furthermore, the jury was presented with Hammoud's handwriting exemplars, and it had every right to evaluate the evidence for itself.

See Bradford Trust Co. of Boston v. Merrill Lynch, 805 F.2d 49, 54 (2d Cir. 1986).

Viewing the evidence presented by the government in its entirety, see United States v. Villegas, 899 F.2d 1324, 1339 (2d Cir.), cart. denied, 498 U.S. 991 (1990), we conclude that there was more than ample evidence for the jury to find that Hammoud had knowingly submitted false loan applications and knowingly misrepresented her social security number thereon. We therefore reject her challenge to the sufficiency of the evidence.

Hammoud also contends that the district court erred in finding that her false statements to the Banks were material. This argument is without merit. Information is material if it has the capacity to influence the bank to which it is made, no showing of actual reliance is necessary. See United States v. Haddock, 956 F.2d 1534, 1550 (10th Cir.), modified

on other grounds, 961 F.2d 933, cert. denied, 113 S. Ct. 88 (1992). The testimony at trial was undisputed that the Banks used an applicant's social security number and birth date to verify the identity of the applicant and to obtain credit information on the applicant. Such information is highly material on a loan application. See United States v. Ryan, 828 F.2d 1010, 1018 (3rd Cir. 1987). We therefore agree with the district court that the false social security numbers and birth dates submitted by Hammoud should be considered material misrepresentations.

Hammoud contends that the district court improperly limited her cross-examination of Randall Philipps, Norstar Hank's records witness. We disagree. The district court has broad discretion to impose reasonable limits on cross-examination. United States v. Rosa, 11 F.3d 315, 335 (2d Cit. 1993). Defense

counsel's attempt to demonstrate bias on the part of Philipps because other officers within Norstar Bank may have failed to properly respond to a subpoena was of little probative value. Philipps testified principally to establish a foundation for the admission of bank documents and to describe the process by which a credit application is processed. We agree with the district court that, had counsel wished to explore Norstar's failure to properly respond to Hammoud's subpoena, he could have called a representative of the Bank with personal knowledge of the processing of the subpoena.

(signed)
HON. JAMES L. OAKES,

(signed)
HON. ROGER J. MINER,

(signed)
HON. DENNIS G. JACOBS,

Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in the unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Order Limiting Cross-Examination

United States v. Vivian Hammoud

Case Number: 91 CR 247 01 C

Date: December 14, 1993

THE COURT: I'll sustain the objection to questioning on Defendant's Exhibit 2.

* * *

...you can't inquire to this witness about this. After the witness is finished then we'll take it up and put on the record whatever may be said about it, and if necessary we could always have the witness back.

* * *

MR. WERTZ: Your Honor, this is not a discovery issue and this is not an issue of

whether or not the Government can proceed with its case, and this is not an issue of whether or not I had rights to enforce discovery. If my client had made a statement to anyone denying the existence of certain documents and it could later be shown that those documents existed the Government would be shoving it down her throat, and the fact that this has occurred with a bank is no less relevant as to this person and this bank's bias.

THE COURT: All right. I have -- we have an end to this. The exhibits will not be shown to the witness for the jury. There are many avenues that you had to search out this information and I can see nothing here where any information is being hid from you. You had the opportunity to call Miss Thomas, you've had the opportunity to at an earlier stage, I don't think now, to call her as a witness, perhaps even now to call

her as a witness, you don't have any burdens at all of putting any proof in in this case, but I don't see how you are deprived of any opportunity to defend your client because of the response to this subpoena. [R. 390, 400]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Order Regarding Materiality

United States v. Vivian Hammoud

Case Number: 91 CR 247 01 C

Date: December 16, 1993

THE COURT: ...The essence of the crime was the making of false statements with intent to influence the bank and whether or not the bank was actually induced to rely upon them is irrelevant. Then certain cases were cited and then the Court continued, it does not lie with one knowingly making false statements with intent to mislead to say that the statements were not influential or the information not important; that is a quote from Sabatino. And then after citing another case the

Court continued, in any event any question of materiality would be for the court, not the jury. So that the question of materiality then is for the Court to decide, and it seems to me when you look at the proposed instruction here or the substance of all the discussion in Crary where the Court says that the essence of the crime was the making of false statements with intent to influence the bank and whether or not the bank was actually induced to rely upon them is irrelevant, it would seem to me under the circumstances that for a person, when he is making an application to the bank, that he would believe, it would seem to me, that it would be material that he give his correct age and date of birth and also that he set forth correctly his correct Social Security number. So that I would find under the circumstances that the statements are material.... [R. 715-6]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed Prior

to November 1. 1987)

FILED

94 MAY 6 AM 11:27

UNITED STATES OF AMERICA

V. Case Number: 91 CR 247 01 C

VIVIAN HAMMOUD

Howard Wertz, Esq.

Defendant's Attorney

THE DEFENDANT:

_ pleaded guilty to count(s) _____

X was found guilty on count(s) 1 through 10 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

18:1014 false statements on loan & credit application 10/17/87 1,3,5,7 & 9

42:408(a)(2) falsely presented Social Security account number not assigned to her 10/17/87 2, 4, 6, 8 & 10

_ The defendant has been found not guilty on count(s) and is discharged as to such count(s).

_ Count(s)_____(is) (are) dismissed on the motion of the United States.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is sentenced to the custody of the U.S. Bureau of Prisons for six (6) months; defendant to pay Special Assessment of $50 on each count for a total of $500; defendant may surrender voluntarily; if appeal is filed sentence is deferred until after appeal is complete

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

[List of conditions of probation omitted]

4-29-94

Date of Imposition of Sentence

(signed)

Signature of Judicial Officer

Hon., John T. Curtin, U.S.D.J.

Name and Title of Judicial Officer

5-6-94

Date

Constitutional and Statutory Provisions

U.S. Constitution, Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 1014

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security,

for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation. the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an Insured State-chartered credit union, any institution

the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

42 U.S.C. § 408(g)(2)

Whoever--

(g) for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized there under, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose--

* * *

(2) with intent to deceive, falsely represents a number to be the social security account number assigned by the Secretary to him or to another person, when in fact such number is not the social

security account number assigned by the Secretary to him or to such other person...

* * *

shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than five years, or both.

Any person or other entity who is convicted of a violation of any of the provisions of this section, if such violation is committed by such person or entity in his role as, or in applying to become, a certified payee under section 405(j) of this title on behalf of another individual (other than such person's spouse), upon his second or any subsequent such conviction shall, in lieu of the penalty set forth in the preceding provisions of this section, be guilty of a felony and shall be fined under title 18 or imprisoned for not more than five years, or both. In the case of any violation

described in the preceding sentence, including a first such violation, if the court determines that such violation includes a willful misuse of funds by such person or entity, the court may also require that full or partial restitution of such funds be made to the individual for whom such person or entity was the certified payee.

Any individual or entity convicted of a felony under this section or under section 1383a(b) of this title may not be certified as a payee under section 405(j) of this title. For the purpose of subsection (g) of this section, the terms "social security number" and "social security account number" mean such numbers as are assigned by the Secretary under section 405(c)(2) of this title whether or not, in actual use, such numbers are called social security numbers.